

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**IN RE LORAZEPAM & CLORAZEPATE  
ANTITRUST LITIGATION**

**MDL Docket No. 1290 (TFH)  
Misc. No. 99ms276 (TFH)**

**This Order applies to:**

**HEALTH CARE SERVICE CORPORATION,  
et al.,**

**Plaintiffs,**

**Civ. No. 01-2646 (TFH/JMF)**

**v.**

**MYLAN LABORATORIES, INC.,  
et al.,**

**Defendants.**

**MEMORANDUM OPINION**

**I. INTRODUCTION**

Pending before the Court is Defendants' Motion for Clarification and/or Reconsideration Regarding Out-of-State Damages ("Motion"). For the reasons stated below, the motion will be granted in part and denied in part.

**II. DISCUSSION**

**A. Background**

Defendants request that the Court reexamine a portion (pp. 27-31) of its October 17, 2003 Memorandum Opinion [# 447] and clarify whether, under the Court's ruling, Health Care Services Corporation ("HCSC") must show that each and every Texas or New Mexico sale for which it seeks damages involved some actual conduct that "occurred at least in part in Illinois,"

slip op. 31, or whether it is sufficient for HCSC to allege that it suffered some "ultimate[]" financial[]" injury in Illinois, id., from conduct that occurred entirely outside of the state. Defendants argue that the Commerce Clause precludes application of a state economic regulatory statute to commerce that takes place wholly outside of the State's border, whether or not the commerce has effects within the state. Motion at 5–6 (quoting Healy v. Beer Institute, 491 U.S. 324, 336 (1989) ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."))

For the oral argument on February 4, 2004, the Court ordered that the parties focus their arguments on at least the following issues:

(1) *The timing of HCSC's acquisition of its Texas and New Mexico divisions, and whether HCSC purchased any rights and liabilities which allow it to bring a cause of action for relevant time periods before HCSC acquired those two divisions.*

(2) *Whether HCSC can show that any pertinent sales occurred in Illinois and, in conjunction with the fact that HCSC is incorporated in Illinois, whether such a showing (or lack thereof) permits Illinois law to regulate activities that occurred outside of Illinois.*

## **B. Analysis**

Counsel for Plaintiff HCSC [hereinafter "counsel"] confirmed that HCSC merged with Blue Cross Blue Shield ("BCBS") of Texas effective January 1, 1999, see Tr. of Feb. 4, 2004 Hrg. at 19:9–12, and BCBS of New Mexico "roughly around July of 2001." Id. at 19:15.

Counsel further stated that HCSC is "not seeking to recover for any premerger or preacquisition conduct." Id. at 20:3–5. As to the length of time in which the damages occurred, counsel noted that

we have pled damages going from 1998 through the present, because we believe that those effects from that conduct continued on through the present.

The price increases for these drugs . . . were in the 3,000 to 9,000 percent range.

....

And those effects just don't end overnight. . . . there was an effect on the market . . . other players in the market raised their prices as well. And, of course, they didn't immediately reduce their prices at the end of [Defendants'] exclusive agreement.

Id. at 18:15–19:5.

In arguing that Healy is inapplicable to the case at hand, counsel stated that

HCSC is specifically not seeking subrogation or seeking to recover the monies paid by its individual members. What HCSC is doing, very simply, is simply attempting to recover the monies it overpaid in Illinois for its prescription drug costs related to lorazepam and clorazepate during the relevant time period here.

Tr. of Feb. 4, 2004 Hrg. at 28:1–7. Counsel was very clear in representing to the Court that HCSC, which is headquartered in Illinois, was paying the pharmacy benefit manager bills for lorazepam and clorazepate prescriptions filled in its Texas and New Mexico divisions. See generally id. at 29–33. Crucially, "HCSC is not seeking to recover on behalf of its members here. It is only seeking to recover the money it paid in Illinois." Id. at 33. Put simply, "HCSC is seeking to recover, under Illinois law, for damages it sustained in Illinois [from] overpayments made in Illinois . . . ." Id. at 19:20–23. Such damages are distinct from the slight nexus of mere "effects within the State" precluded by Healy.

The above representations by counsel coincide with the Court's previous understanding of the claims pled by HCSC in its Second Amended Complaint. HCSC has averred that (1) its Illinois headquarters paid for sales that occurred in Texas and New Mexico (after deductions for co-payments), (2) that it was directly damaged in Illinois, and (3) that by making the payments from its headquarters in Illinois, the transactions in question did not "wholly occur" in other States in violation of the Commerce Clause. These representations by HCSC should guide the parties in discovery.

As this Memorandum Opinion serves to further clarify the Court's Memorandum Opinion of October 17, 2003, Defendants' Motion is granted in part. Concomitantly, since the Commerce Clause does not prohibit HCSC's attempt to seek damages under Illinois law in this case, Defendants' Motion will be denied in part.

### **III. CONCLUSION**

For the reasons stated above, the Court will grant in part and deny in part Defendants' Motion for Clarification and/or Reconsideration Regarding Out-of-State Damages. An appropriate Order will accompany this Memorandum Opinion.

March 22, 2004

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas F. Hogan  
Chief Judge

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**ORDER**

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

**ORDERED** that Defendants' Motion for Clarification and/or Reconsideration Regarding  
Out-of-State Damages<sup>1</sup> is **GRANTED IN PART** and **DENIED IN PART**.

**SO ORDERED.**

March 22, 2004

/s/

Thomas F. Hogan  
Chief Judge

<sup>1</sup> Civil No. 99mc0276 docket # 464 and Civil No. 01-2646 docket # 52.